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No. 89-84

In the Supreme Court of the United States

OCTOBER TERM, 1990

RICHARD M. DRAY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether petitioner's acquittals during a prior trial on counts charging him with mail fraud collaterally estopped the government from introducing evidence relating to those counts during petitioner's retrial on a count charging him with conspiracy to commit mail fraud.

2. Whether petitioner was entitled to a jury instruction limiting the purposes for which that evidence could be considered.

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In the Supreme Court of the United States

OCTOBER TERM, 1990

No. 90-54

RICHARD M. DRAY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-20a) is reported at 901 F.2d 1132. The opinion of the district court (Pet. App. 21a-27a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on March 28, 1990. A petition for rehearing was denied on April 20, 1990. See 901 F.2d 1132.[1] The petition for a writ of certiorari was filed on June 26, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

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[1] The government sought rehearing. The reported version of the court of appeals' decision includes an opinion, issued on April 20, 1990, denying the government's petition for rehearing. 901 F.2d at 1143.

STATEMENT

1. Petitioner has been tried twice. The evidence at the second trial, which was substantially the same as that introduced during the first trial, is summarized in the opinion of the court of appeals. Pet. App. 2a-4a, 6a. It showed that petitioner, a Boston attorney, conspired with co-defendant Paul Ochs, Jr., to reduce the fee for a construction permit for the renovation of a building in Boston by understating the cost of the project and bribing a public official to approve the fraudulent cost estimate. The owner of the building was Temple Place Associates (TPA), a Philadelphia-based limited partnership. TPA hired Ochs' firm, Stanhope Development Company, to oversee the renovation; one of Stanhope's duties was to assist in obtaining the necessary permits. The general contractor for the project, Mirabassi Associates, Inc., was obligated to pay the fees for the permits. At Ochs' urging, TPA hired petitioner to handle the legal matters associated with obtaining the permits. Pet. App. 2a-3a.

During the relevant period in Boston, the fee for a construction permit was based upon the estimated cost of the work. An application for a permit had to contain an estimated cost of construction; the City's Department of Inspectional Services would review the estimate to determine whether it was reasonable. *United States* v. *Ochs*, 842 F.2d 515, 517 (1st Cir. 1988). Petitioner and Ochs arranged to bribe Douglas Robinson, the chief building inspector in the Department (whom petitioner had known for 15 years), to obtain Robinson's approval of a fraudulent application understating the cost of their renovation. In May 1984, petitioner met with Robinson. They discussed "lowballing"—*i.e.*, lowering the estimated cost of the project—and then splitting the amount that could be saved in permit fees. Pet. App. 3a.

In the meantime, Mirabassi had estimated the cost of the renovation to be $2,425,000, which would have required a permit fee of $23,950. Petitioner informed Mirabassi that its estimated cost was too high, and he directed Mirabassi to prepare a new application for the construction permit showing an estimated cost of $1,200,000. After Ochs signed the application, petitioner delivered it to Robinson, who processed and approved it. As a result of the fraudulent estimate of the cost of construction, Mirabassi paid a permit fee that was $12,200 lower than it would have been under the original cost estimate. Pet. App. 3a.

To recapture some of the savings on the permit fee, petitioner billed TPA $1,687.50 for conferring with Ochs and preparing and filing the permit application. Ochs transmitted the bill to TPA, which paid it. The next day, petitioner also billed Mirabassi $5,975 for preparing and filing the permit application. Ochs hand-delivered the bill and directed Mirabassi to pay it. Although Mirabassi had not retained petitioner and was not contractually bound to pay him, it made the requested payment. Shortly thereafter, petitioner wrote a check to Ochs for $3,000 and gave Robinson $400 in cash. Pet. App. 3a-4a.

Nearly a year later, petitioner sent another bill to TPA for $30,000; the invoice again included charges for his services in obtaining the construction permit. When Ochs protested on behalf of TPA that the charges were inordinate, petitioner wrote back to Ochs, reminding Ochs of the importance to the project of petitioner's political connections. Ochs then persuaded TPA to pay the full $30,000. Pet. App. 4a.

2. Petitioner was indicted in the District of Massachusetts and charged with five counts of mail fraud, in violation of 18 U.S.C. 1341, and one count of conspiracy to commit mail fraud, in violation of 18 U.S.C. 371. At

petitioner's first trial, the government introduced seven documents to prove the mailings required for convictions on the substantive mail fraud offenses charged in Counts 2-6 of the indictment.[2] The prosecutor also introduced evidence that the contracting parties frequently used the mails to transmit documents between Boston and Philadelphia. A TPA employee testified that it was the customary practice of TPA and Mirabassi to send written materials back and forth by either mail or Federal Express, depending on time constraints, but he could not recall the specific manner in which each of the seven documents underlying Counts 2-6 were transmitted. To establish mail fraud, it was necessary to prove that the documents had travelled through the mails, rather than by Federal Express. The government relied upon the dates on which documents were sent and received to demonstrate that the mails were used. Pet. App. 4a-5a.

At the close of the government's case in chief, the district court entered judgments of acquittal on three of the substantive mail fraud counts, Counts 2, 3, and 5. Although it acknowledged the possibility that the mails were used to transmit the three documents underlying those counts, the court concluded that there was insufficient evidence for a jury to find beyond a reasonable doubt that the documents had been mailed. The jury subsequently acquitted petitioner and Ochs of the two remaining substantive mail fraud offenses charged in Counts 4 and 6. The jury found petitioner and Ochs guilty of conspiracy to commit mail fraud (Count 1). Pet. App. 5a.

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[2] In a table appended to the court of appeals' opinion, the court provided the exhibit numbers of the documents, showed the counts to which they related, and briefly summarized their contents. Pet. App. 20a.

3. While petitioner's appeal was pending, this Court held in *McNally* v. *United States*, 483 U.S. 350 (1987), that the mail fraud statute did not prohibit schemes to defraud citizens of their "intangible right" to honest government services. In light of *McNally*, the court of appeals vacated petitioner's conspiracy conviction and remanded the case for a new trial. *United States* v. *Ochs*, *supra*. On remand to the district court, petitioner filed a motion in limine in which he claimed that the doctrine of collateral estoppel barred the introduction of the seven documents on which the substantive mail fraud counts had been based as well as any evidence that those documents had been mailed. The district court denied the motion. Pet. App. 21a-27a.

The district court concluded that the jury's acquittals on Counts 4 and 6 did not bar the introduction of the documents underlying those counts because "there is no clear indication of the basis of the jury's verdict." Pet. App. 24a-25a. Further, noting that the government would not have to prove that the documents had actually been mailed in order to obtain a conspiracy conviction, the court concluded that the documents involved in all of the substantive counts could be introduced to show that it was reasonably foreseeable that the mails would be used to advance the conspiracy, as well as to establish other elements of the conspiracy offense, such as the existence of a scheme and agreement to defraud. *Id.* at 26a-27a.

After the court denied the motion in limine, petitioner requested limiting instructions with respect to five of the seven documents underlying Counts 2-6. Pet. App. 35a-37a. Petitioner asked that the jury be instructed, in the alternative, (a) that the documents were to be considered only on the issue of whether a conspiracy existed and not on the issue of whether it was reasonably foreseeable that the mails would be used as part of the conspiracy, or (b)

that the documents had been introduced for the purpose of showing that it was reasonably foreseeable that the mails would be used as part of the conspiracy. The district court did not give either instruction. Pet. App. 6a, 16a.

At the conclusion of the second trial, petitioner was again convicted on the conspiracy count. The court sentenced him to one year's imprisonment, with all but the first six months suspended in favor of two years' probation. As a condition of probation, the district court ordered petitioner to perform 500 hours of community service.

4. The court of appeals affirmed. Pet. App. 1a-20a. With respect to petitioner's collateral estoppel claim, the court of appeals noted that the district court's acquittals on Counts 2, 3 and 5 determined in petitioner's favor the issue whether the three documents underlying those counts had actually been mailed, but it held that this determination did not estop the government from offering those documents to show that a conspiracy existed and that the use of the mails was reasonably foreseeable. *Id.* at 10a, 12a.

For similar reasons, the court of appeals also concluded that the jury's acquittals on Counts 4 and 6 did not bar the introduction of the documents on which those counts were based. Pet. App. 12a-15a. The court rejected petitioner's contention that the jury's acquittals on Counts 4 and 6 necessarily determined that no fraudulent scheme existed, that petitioner was not a willful participant in the scheme, or that the use of the mails was not reasonably foreseeable. Because petitioner was convicted of conspiracy, the court reasoned, "it seems highly probable, if not ineluctable, that the original jury found insufficient evidence that the exhibits in question were actually mailed, but sufficient evidence that mailing was contemplated." *Id.* at 13a. The court concluded that petitioner had not sustained

his burden of showing that the documents were used during the retrial to prove an issue resolved in his favor by his prior acquittals. *Id.* at 13a-15a.

The court of appeals also held that the district court did not abuse its discretion in refusing to give petitioner's proposed jury instructions. Pet. App. 16a-17a. It concluded that "restriction of the evidence by informing the jurors that they could not consider the exhibits as proof of actual mailing would have been redundant," since the district court "told the jury, in so many words, that mailing was *not* the issue" during its jury charge. *Id.* at 16a. The court added that "it was unnecessary—and would have been confusing—to tell the jury not to consider the documents on that (non)issue." *Id.* at 17a. The court also noted that "there was no reason to restrict the admission of the documents solely to the issue of reasonable foreseeability" because "they were also relevant to the existence of the conspiracy charged in the indictment." *Ibid.*

ARGUMENT

1. Petitioner contends that the acquittals on the substantive mail fraud counts at his first trial collaterally estopped the government from offering the documents on which those counts were based into evidence during his retrial on the conspiracy count. Pet. 16-22.

As the court of appeals recognized, the doctrine of collateral estoppel prohibits relitigation only of those issues that have actually been decided in a party's favor. *Dowling* v. *United States*, 110 S. Ct. 668, 673 (1990). In determining whether collateral estoppel applies, the court must " 'examine the record of a prior proceeding, taking into account the pleadings, evidence, charge, and other relevant matter, and conclude whether a rational jury could have grounded its verdict upon an issue other than that

which the defendant seeks to foreclose from consideration' " during the second trial. *Ashe* v. *Swenson,* 397 U.S. 436, 444 (1970). The burden is on the defendant to show that the verdict in the prior trial necessarily decided the issue raised in the second trial. See *Dowling* v. *United States,* 110 S. Ct. at 673.

At petitioner's first trial, the district court made clear that its judgments of acquittal on Counts 2, 3, and 5 were based on the absence of proof demonstrating beyond a reasonable doubt that the documents involved in those counts had actually been mailed. As the court of appeals noted, the most plausible explanation of the jury's not guilty verdicts on Counts 4 and 6 was that it had reached the same conclusion with respect to the documents involved in those counts. At most, therefore, the government was foreclosed from relitigating the issue of whether any of the documents in question was actually mailed.[3]

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[3] Relying on an excerpt from the jury instructions at his first trial, petitioner suggests that the jury must have found in that trial that the use of the mails was not reasonably foreseeable. Pet. 20-22. In that instruction, the court advised the jury that it was necessary for a conviction on a substantive mail fraud count that a defendant specifically intend to use the mails and that, *to establish intent,* it was sufficient to demonstrate that it was reasonably foreseeable to a defendant that his actions would cause others to use the mails. For the reasons stated in the court of appeals' opinion, there is no reason to believe that the acquittals on Counts 4 and 6 were based on a failure of proof on the issue of intent, rather than a failure to use the mails, the *actus reus* of the offense. Pet. App. 14a-15a. Moreover, at most, petitioner's argument suggests that the verdict does not disclose on its face whether the acquittals on Counts 4 and 6 were based on a jury determination that the government failed sufficiently to prove that the documents involved were actually mailed, that petitioner and his co-defendant lacked the requisite intent to use the mails to transmit the documents, or both. In that situation, collateral estoppel would not foreclose relitigation of any issue.

During petitioner's second trial, the documents were admitted to prove different issues. As the court of appeals noted, the documents were relevant to show that petitioner and Ochs had conspired with one another and that they either intended or reasonably foresaw that the mails would be used to further their scheme to defraud. See, *e.g.*, *United States* v. *Citron*, 853 F.2d 1055, 1058-1059 (2d Cir. 1988); *United States* v. *Price*, 750 F.2d 363, 366 (5th Cir.), cert. denied, 473 U.S. 904 (1985). Petitioner has not sustained his burden of showing that the documents were offered in the second trial to prove an issue that was resolved in his favor in the first trial.[4]

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[4] There are two additional reasons, not addressed in the court of appeals' opinion, why collateral estoppel did not foreclose the admission of the documents in question. First, even if the documents had been offered to demonstrate that they were actually mailed, they were not introduced to prove that proposition beyond a reasonable doubt. The jury was instructed that the ultimate issue was whether petitioner and Ochs had entered a conspiracy with respect to which the use of the mails was reasonably foreseeable (see Pet. App. 16a-17a), and this was the question to which the reasonable doubt standard applied. The government was not called upon to demonstrate beyond a reasonable doubt that the documents were actually mailed. Thus, under *Dowling* v. *United States*, 110 S. Ct. at 671-673, the jury could properly have considered whether the documents were actually mailed in the course of determining whether the government had carried its burden of demonstrating beyond a reasonable doubt that the use of the mails was reasonably foreseeable.

Second, this Court noted in *Ohio* v. *Johnson*, 467 U.S. 493, 500 n.9 (1984), that, "where the State has made no effort to prosecute the charges seriatim, the considerations of double jeopardy protection implicit in the application of collateral estoppel are inapplicable." See also *United States* v. *Ashley Transfer & Storage Co.*, 858 F.2d 221, 227 (4th Cir. 1988), cert. denied, 109 S. Ct. 1932 (1989). Here, the government made no attempt to pursue successive prosecutions; the retrial resulted from a reversal on appeal sought by petitioner. Accordingly, the doctrine of collateral estoppel should not foreclose the government from establishing facts in the retrial even if the partial

2. The district court did not err in refusing to deliver petitioner's proposed limiting instructions. See Pet. 22-26.

First, neither of the alternatives proposed by petitioner was a correct statement of applicable law. The first alternative would have permitted the jury to consider the documents only on the issue of whether petitioner and his co-defendant had agreed to devise a scheme to defraud and would have prohibited the jury from relying on them in determining whether it was reasonably foreseeable that the mails would be used to further such a conspiracy. The second alternative would have effectively advised the jury that the documents had been admitted only for the purpose of showing reasonable foreseeability. As we have shown, however, the jury was entitled to consider the documents on both the question whether petitioner and the co-defendant had conspired with one another and the question whether the use of the mails was reasonably foreseeable. See Pet. App. 35a-37a. Consequently, both of petitioner's proposed instructions would have improperly limited the jury's consideration of the documents.

Second, in view of other instructions limiting the issues in the case, an instruction limiting the use of the documents was unnecessary and would have been confusing. It is well established that jury instructions are viewed as whole. See *United States* v. *Park*, 421 U.S. 658, 674 (1975); *Cupp* v. *Naughten*, 414 U.S. 141, 147 (1973). Here, the district court "painstakingly" explained the difference between substantive mail fraud and a conspiracy to commit mail fraud and "told the jury, in so many words, that mailing was *not* the issue" during its jury charge. Pet. App. 16a. Thus, as the court of appeals noted, it would have been confusing to instruct the jury not to consider the documents to resolve a matter that

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verdict at the first trial could confidently be said to represent a finding against the government on those facts.

was not at issue. *Id.* at 17a. The district court's jury charge effectively guided the jury's consideration of all of the evidence introduced at trial, including the documents at issue. In light of the court's careful definition of the ultimate issue in the case, Fed. R. Evid. 105 did not require a separate limiting instruction on those documents.[5]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[5] Since petitioner's conspiracy conviction at the first trial was reversed on grounds other than the insufficiency of the evidence, the Double Jeopardy Clause did not bar the retrial. See, *e.g.*, *Montana* v. *Hall*, 481 U.S. 400 (1987); *United States* v. *Scott*, 437 U.S. 82, 90-91 (1978). There is no merit to petitioner's suggestion (Pet. 18, 20) that this Court's recent decision in *Grady* v. *Corbin*, 110 S. Ct. 2084 (1990), may apply to this case. *Grady* applies only when the government initiates multiple prosecutions for a single offense. It has no application to a retrial required in the course of a single prosecution.

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